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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BAHRAM KADKHODA, Plaintiff and Respondent, v. DAIMLER VEHICLE INNOVATIONS USA, LLC, Defendant and Appellant.	B293587 (Los Angeles County Super. Ct. No. BC563069)

APPEAL from an order of the Superior Court of Los Angeles County, Terry Green, Judge. Affirmed.

Lehrman Law Group, Kate S. Lehrman, Robert A. Philipson for Defendant and Appellant.

Rosner Barry & Babbitt, Hallen D. Rosner, and Arlyn L Escalante; Strategic Legal Practice, Payam Shahian and Jacob W. Cutler for Plaintiff and Respondent.

INTRODUCTION

Defendant Daimler Vehicle Innovations, LLC (Mercedes-Benz) appeals the trial court's award of attorney's fees, costs, and prejudgment interest to plaintiff Bahram Kadkhoda. Plaintiff successfully sued Mercedes-Benz for its failure to buy back a defective car it had leased to plaintiff. Mercedes-Benz does not contest the jury's damage award. On appeal, it argues the trial court's award of $278,057.00 in attorney's fees, $56,882.89 in costs, and prejudgment interest of $2,600.00 was error because plaintiff failed to obtain a more favorable award than Mercedes-Benz's Code of Civil Procedure section 998 offer (998 offer), and plaintiff was, thus, not the prevailing party.

We affirm, holding the trial court correctly (1) awarded prejudgment interest, and (2) as a result, found plaintiff was the prevailing party because he recovered more than Mercedes-Benz's 998 offer, which did not include prejudgment interest.

FACTS AND PROCEDURAL BACKGROUND

1. Plaintiff's lease of Defective Vehicle from Mercedes-Benz

On July 27, 2013, plaintiff leased a 2013 SmartC vehicle from Mercedes-Benz. Under the terms of the contract, he agreed to pay $764.62 at lease signing and $143.52 monthly for 36 months. The total amount due under the lease was $6,182.82.[1] Soon after, plaintiff began experiencing problems with the vehicle's transmission. He took the vehicle to the dealer five times for transmission/drivetrain repairs.

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[1] The lease expired while litigation was pending, at which time, plaintiff extended the lease for four months at a total cost of $574.08. On December 22, 2016, plaintiff purchased the vehicle for $15,204.20, financed over five years at 16.99 percent interest.

On September 16, 2014, plaintiff telephoned Mercedes-Benz to request a repurchase of his vehicle because of the defective transmission.[2] After this phone call, plaintiff received an email from Mercedes-Benz stating that it would review his request and respond in two to four weeks. Six weeks went by with no answer.

2. Plaintiff's Complaint

Not hearing from Mercedes-Benz, on November 5, 2014, plaintiff brought suit. He alleged causes of action for breach of implied and express warranties, and "violation of statutory obligations" under the Song-Beverly Consumer Warranty Act (Song-Beverly), codified in Civil Code section 1790 et seq., and the federal Magnuson-Moss Warranty Act, title 15 of the United States Code section 2301 et seq. Plaintiff sought actual, consequential, and incidental damages, a civil penalty in the amount of two times his actual damages, attorney's fees, costs, and prejudgment interest.

As it turned out, the same day that plaintiff filed his complaint, Mercedes-Benz's Customer Assistance Center mailed a letter to plaintiff stating it "will agree to propose an offer to repurchase the subject vehicle." On November 7, 2014, a Mercedes-Benz representative called plaintiff about his request to repurchase. Plaintiff informed her he was now represented by an attorney. Mercedes-Benz then emailed plaintiff's counsel on November 11, 2014, informing him that Mercedes-Benz would

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[2] The parties often use the term "repurchase" as shorthand for cancellation of the lease and return of payments. The Song-Beverly Consumer Warranty Act "applies to leases as well as sales of consumer goods." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1044; see Civ. Code, §§ 1795.4, 1791, subd. (a).)

not cover attorney's fees. On November 21, 2014, plaintiff's counsel responded that plaintiff had already filed suit.

On December 11, 2014, Mercedes-Benz filed an answer generally denying all allegations.

3. *The 998 Offer*

On March 27, 2015, four months after filing its answer, Mercedes-Benz made a Code of Civil Procedure section 998 offer (998 offer). We describe the basic mechanism of statutory 998 offers and provide excerpts of the 998 offer in this case in the Discussion section of our opinion. In general, the offer stated Mercedes-Benz would repurchase the vehicle in accordance with Civil Code section 1793.2, subdivision (d)(2) (part of Song-Beverly) for the amount of the vehicle down payment, any and all payments made, and the amount of plaintiff's outstanding loan obligation related to the purchase of the subject vehicle, and any collateral charges and incidental costs. The offer also stated Mercedes-Benz would pay plaintiff's recoverable court costs, expenses, and reasonably-incurred attorney fees.

Plaintiff's counsel responded that the offer was "fatally vague, incapable of valuation, and utterly lacking in any reasonable prospect of acceptance." Counsel wrote: "At the outset, is Defendant admitting to liability in this matter? Is Defendant agreeing to a full statutory repurchase of Plaintiff's car? Is Defendant agreeing to pay Plaintiff's incidental and consequential damages associated with the subject vehicle? Is Defendant agreeing that the car is a 'lemon'? Will Defendant agree to brand the subject vehicle's title as a lemon since that is an essential requirement under California lemon law? Does Defendant agree that Plaintiff has 'prevailed' for purposes of the lawsuit? Such questions still remain unanswered by virtue of Defendant's unclear 998 Offer."

Counsel's letter continued: "Next, it is unclear precisely how the Defendant intends to calculate the repurchase offer. If Defendant is repurchasing Plaintiffs vehicle pursuant to Civil Code, [section] 1793.2[, subdivision] (d)(2)(B), then that amount should include the amount paid or payable plus incidental and consequential damages. In the same vein, Defendant's offer does not specify a mileage offset in accordance with Civil Code [section] 1793.2[, subdivision] (d)(2)(C). If Defendant is repurchasing Plaintiff's vehicle, it ought to specify the mileage offset so that Plaintiff can properly assess the fairness of Defendant's offer. The 988 Offer as it stands simply offers Plaintiff an overly broad statement without specifying, among other things the mileage offset. Without more, it is impossible for Plaintiff to assess, much less accept, such an offer to compromise." Counsel also complained that he could not evaluate the offer without receiving discovery.

Mercedes-Benz did not respond to plaintiff.

4. Amended Answer

After one year of litigation, the court granted Mercedes-Benz leave to file an amended answer. Mercedes-Benz admitted it distributed the vehicle, the vehicle was defective, it could not fix the vehicle after a reasonable number of opportunities, it had given plaintiff an express warranty on the vehicle, the vehicle was subject to implied warranties, and plaintiff may recover damages for the vehicle. Mercedes-Benz denied any liability for a civil penalty.

5. Trial

The first trial in April 2017 ended in mistrial. In July 2017, the case was again tried before a jury on two causes of action: breach of express warranty and breach of the implied warranty of merchantability. In response to a question on the special verdict form, the jury found that Mercedes-Benz failed to

promptly repurchase or replace the vehicle. The jury also found that Mercedes-Benz did at some point attempt to repurchase the vehicle to satisfy its obligations under the Civil Code. Because the jury answered this question in the affirmative, it was directed to not answer the verdict questions concerning the award of a civil penalty. No penalty was awarded.

On July 12, 2017, the jury returned a verdict of $2,176.00 on the express warranty claim and $2,482.00 on the implied warranty claim. Plaintiff elected the greater damages, and a judgment on the jury verdict was entered on August 30, 2017.

6. Additur

On September 15, 2017, plaintiff filed a motion to set aside the judgment, and a motion for new trial or additur. Plaintiff asserted the damages award was insufficient and failed to reimburse the payments he had made plus the payments he still owed. Plaintiff asserted $22,375.62 in damages should have been awarded. The trial court signed a conditional order increasing the verdict amount to $22,375.62, and Mercedes Benz consented to the additur. Posttrial, one of Mercedes-Benz's attorneys filed a declaration in which he stated, "MBUSA consented to the additur, reimbursing plaintiff for his vehicle for a total amount of $22,375.62 representing the amount currently necessary to put plaintiff in a position where he has no out-of-pocket costs associated with the vehicle." On January 29, 2018, the trial court signed the amended judgment, awarding plaintiff $22,375.62 with interest at the rate of 10 percent from the date of entry of judgment until paid. Attorney's fees, costs and prejudgment interest were to be determined by noticed motion.

7. Posttrial Motions

Plaintiff and Mercedes-Benz each filed a motion for costs and competing motions to tax or strike each other's costs. Mercedes-Benz argued that because plaintiff had rejected

Mercedes-Benz's 998 offer to repurchase plaintiff's vehicle and failed to obtain a more favorable judgment, plaintiff was only entitled to recover his preoffer costs while Mercedes-Benz was entitled to recover its post-offer costs. Plaintiff asserted he was entitled to costs as the prevailing party with a net monetary recovery.

Plaintiff also moved for prejudgment interest, and attorney's fees, both of which Mercedes-Benz opposed. Plaintiff brought the motion for prejudgment interest under Civil Code section 3287, subdivision (a) to be calculated from the date of the purchase, or alternatively from the date of the complaint pursuant to Civil Code section 3287, subdivision (b).[3]

8. Award of Fees, Costs, and Prejudgment Interest

On May 3, 2018, the court heard argument on prejudgment interest and decided that it would award prejudgment interest at 10 percent on plaintiff's out-of-pocket expenses, but the court made no actual award at the hearing. The court asked plaintiff to calculate the interest.

Plaintiff filed supplemental declarations calculating prejudgment interest on his damages. He proposed alternative amounts based on interest of 10 percent: $6,613.03 calculated from the date of the lease, or $4,745.97 calculated from the date of the complaint. These calculations were based on the $14,655.39 check dated April 30, 2018, that Mercedes-Benz sent to plaintiff, pursuant to the January 29, 2018 judgment. The

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[3] We refer to the two subdivisions of Civil Code section 3287 as "section 3287(a)" and "section 3287(b)," respectively.

amount was intended to reimburse plaintiff for the payments he had made as of April 30, 2018.[4]

On July 17, 2018, the court heard the pending motions. The court first reiterated that plaintiff was entitled to prejudgment interest at the rate of 10 percent because it was a breach of contract action. The court limited prejudgment interest to the period of time up to the 998 offer. The court indicated it would award interest pursuant to section 3287(a). After much debate, the parties appeared to have settled on $2,600 in prejudgment, pre-section 998 offer interest, an amount suggested by defense counsel.

The court concluded that plaintiff was the prevailing party because plaintiff received a more favorable monetary recovery due to the inclusion of the preoffer prejudgment interest. No prejudgment interest was included in Mercedes-Benz's 998 offer.

The court awarded plaintiff $278,057 in attorney's fees, $56,882.89 in costs, and $2,600 in prejudgment interest. It also granted plaintiff's motion to strike Mercedes-Benz's costs.

On August 8, 2018, the court entered a second amended judgment, awarding plaintiff the accepted additur amount of $22,375.62 in damages, and the costs, fees, and interest listed above. Mercedes-Benz timely appealed.

DISCUSSION

Mercedes-Benz appeals the award of costs, attorney's fees, and prejudgment interest. It argues that its prelitigation offer and its 998 offer cut off its liability for costs, fees, and prejudgment interest because plaintiff did not prevail at trial. Before we address these contentions, we discuss the automobile

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[4] The remainder of the $22,375.62 judgment was to pay off the balance of the loan on the vehicle.

lemon law generally and review the legal principles operative in this appeal.

1. Legal Overview

a. Lemon Law

Song-Beverly is commonly known as the automobile "lemon law." (*Duale v. Mercedes–Benz USA, LLC* (2007) 148 Cal.App.4th 718, 721 (*Duale*).) The act requires automobile manufacturers to repair a new motor vehicle within a reasonable number of attempts. If the manufacturer cannot repair the vehicle, the manufacturer must replace it or pay restitution to the buyer, at the buyer's election. (Civ. Code, § 1793.2, subd. (d)(2).) Civil Code section 1794, subdivision (a) permits the buyer to bring an action for recovery of damages and other relief. "If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages." (Civ. Code, § 1794, subd. (c).)

If the buyer prevails in the action against the seller, "the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (Civ. Code, § 1794, subd. (d).)

b. 998 Offers

The present appeal features the interplay between section 998 and Song-Beverly. Song-Beverly "provides no exception to the provisions of section 998." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 1000.) Section 998 states in part: "(c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay

the defendant's costs from the time of the offer." (§ 998, subd. (c)(1).) Section 998 is "a cost-shifting statute which encourages the settlement of actions, by penalizing parties who fail to accept reasonable pretrial settlement offers." (*Heritage Eng'g Constr. v. City of Indus.* (1998) 65 Cal.App.4th 1435, 1439.)

Here, Mercedes-Benz argues that it made a valid *prelitigation* offer and a subsequent valid 998 offer. Plaintiff's rejection of both offers, Mercedes-Benz contends, cut off its liability for costs and attorney's fees.

c. Standard of Review

We review the trial court's prevailing party determination for abuse of discretion. (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1049 (*MacQuiddy*).) "We independently review whether respondent's 998 settlement offer was valid." (*Ibid.*; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 765 (*Fassberg*).)

2. Mercedes-Benz's Prelitigation Repurchase Communications Did Not Satisfy Its Obligations Under Song-Beverly

Mercedes-Benz argues that it's prelitigation communications amounted to an attempt to repurchase the vehicle under Song-Beverly at the outset of the litigation, and that the jury found these communications to fulfill all of Mercedes-Benz's obligations under Civil Code section 1793.2, subdivision (d). Section 1793.2, subdivision (d) obligates the automobile manufacturer to afford the buyer either restitution or replacement of a vehicle if the manufacturer is unable to repair the vehicle after a reasonable number of attempts. Mercedes-Benz contends that because it complied with section 1793.2, subdivision (d) in its prelitigation communications, any further duty to perform was extinguished, citing Civil Code section 1485.

That section states, "An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation." (Civ. Code, § 1485.)

Mercedes-Benz supports this proposition by a letter it sent to plaintiff, dated November 5, 2014, which stated: "Mercedes Benz USA LLC has reviewed the service history and *will agree to propose an offer* to repurchase the subject vehicle. Your information has been submitted to Impartial Services Group, our transfer agent, and they will be contacting you shortly to complete this transaction. [¶] In the event you would like to contact ISG directly, their information is as follows: [address and phone number] [¶] The opportunity to respond is appreciated." (Italics added.) The letter was written approximately two weeks past the date Mercedes-Benz had told plaintiff he would receive a response. As it turned out, plaintiff did not receive the letter until after he had filed his complaint. Mercedes-Benz then tried to contact plaintiff by phone, which in turn prompted the letter from plaintiff's attorney described earlier.

We conclude the November 5, 2014 letter did not qualify as an offer to repurchase the vehicle under Song-Beverly. It merely expressed an intent to propose an offer at some later, unspecified time. The letter failed to satisfy the requirements of Song-Beverly, which required an offer of "restitution in an amount equal to the actual price paid or payable by the buyer, . . . including any collateral charges . . . and other official fees, plus any incidental damages." (Civ. Code, § 1793.2, subd. (d)(2)(B).)

Nor do we agree with Mercedes-Benz's assertion that the jury found that Mercedes-Benz had attempted to fulfill its obligations to plaintiff "at the outset of litigation." In its verdict, the jury answered affirmatively the question: "Did Mercedes-Benz USA, LLC attempt to repurchase [plaintiff]'s vehicle by satisfying all obligations under [Song-Beverly] and

communicating that willingness to fulfill all its obligations under [Song-Beverly] to Plaintiff?" In its verdict, the jury neither identified the November 5, 2014 letter as Mercedes-Benz's purchase attempt nor recorded the date when this attempt occurred. Of greater significance, the jury also found that Mercedes-Benz failed to promptly repurchase or replace the vehicle. It took commencement of the instant litigation to compel Mercedes-Benz's first valid offer—the 998 offer, as we discuss next. Mercedes-Benz did not extinguish its Song-Beverly obligations to plaintiff prior to litigation.

3. *The 998 Offer Was Certain and Valid*

Mercedes-Benz's next argues it made a valid 998 offer to compromise, and the offer limited its liability for costs, fees, and interest. The trial court implicitly found the 998 offer to be valid, and we agree.[5] But, we also agree with the trial court that the validity of the offer did not insulate Mercedes-Benz from an award of costs, fees, and prejudgment interest.

"To be valid, an offer under section 998 may include nonmonetary terms and conditions, but it must be unconditional. [Citation.] '[F]rom the perspective of the offeree, the offer must be sufficiently specific to permit the recipient meaningfully to evaluate it and make a reasoned decision whether to accept it, or reject it and bear the risk he may have to shoulder his opponent's

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[5] Plaintiff asserted at the July 17, 2018 posttrial hearing that the court had previously found the 998 offer invalid. At the earlier May 3, 2018, the court expressed doubts about the offer and pointed out that it contained no dollar amount. Nevertheless, the court apparently found the offer valid because the court distinguished between pre- and post-offer prejudgment interest in its posttrial award at the July hearing. Regardless, our review is de novo. (*MacQuiddy, supra,* 233 Cal.App.4th at p. 1047.)

litigation costs and expenses. [Citation.] Thus, the offeree must be able to clearly evaluate the worth of the extended offer.' " (*MacQuiddy, supra,* 233 Cal.App.4th at p. 1050; *Fassberg, supra,* 152 Cal.App.4th at pp. 764–765.) There is no requirement that a 998 offer contain " 'magic language' " so long as it is a clear written offer which, if accepted, will result in the entry of judgment or a final disposition of the action. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 731–732.)

We conclude the 998 offer was certain and valid. The offer stated: "[Mercedes-Benz] will repurchase the 2013 Mercedes-Benz Smart C . . . at issue in this action (Subject Vehicle), in accordance with California Civil Code section 1793.2(d)(2), for the amount of the vehicle down payment, any and all payments made, and the amount of Plaintiffs outstanding loan obligation related to the purchase of the subject vehicle, if any, as well as any collateral charges and incidental costs in accordance with Civil Code section 1793.2(d)(2)(B), all to be determined by court motion if the parties cannot agree."

Plaintiff argues the offer was uncertain because it did not contain dollar amounts. The absence of a net monetary sum does not invalidate the offer. "Appellants have failed to establish that the absence of a net monetary sum as part of a pretrial statutory settlement offer constitutes a per se violation of the good faith requirement. To the contrary, case law interpreting the good faith requirement allows for great flexibility in customizing pretrial settlement offers." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1264.) Although Mercedes-Benz could have calculated payments plaintiff had made under the lease agreement, it may not have known all of plaintiff's collateral charges and incidental costs as the offer was made only four months into litigation. Stating the offer would cover those costs

and implicitly asking plaintiff for a tabulation of those items was sufficient.

The offer generally tracks Song-Beverly, which states: "the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer." (Civ. Code, § 1793.2, subd. (d)(2)(B).)

Plaintiff complains that "the terms provided were intended for a purchased vehicle not a lease." We disagree. Although Civil Code section 1793.2, subdivision (d)(2)(B), which sets forth the components of restitution refers to a purchase transaction rather than a lease, Civil Code section 1795.4, subdivision (b), gives a lessee of goods the same rights as a purchaser.

Plaintiff also asserts that in paragraphs 5 and 6 of the offer, Mercedes-Benz tried to "cheat" plaintiff out of attorney's fees allotted by Civil Code section 1794, subdivision (d), which allows for costs actually incurred and fees reasonably incurred. Plaintiff contends "Contrary to Song-Beverly, in its offer [Mercedes-Benz] fraudulently only allows for fees 'actually incurred.' In a contingency fee case like this one, attorney fees are not actually incurred because 'the buyer is neither being billed for nor under any obligation to pay for her attorney's services.' [Citation.] Thus, [Mercedes-Benz's] language was blatantly intended to support its argument at a fee motion hearing that fees here were not 'actually incurred' by [plaintiff] and thus could not be recovered under the offer."

We disagree that Mercedes-Benz's attorney's fees provision invalidated the 988 offer. The fifth paragraph of the offer stated: "Additionally, in connection with the above offer to compromise, [Mercedes-Benz] will pay Plaintiffs' recoverable court costs, expenses, and *reasonably-incurred* attorney fees pursuant to Civil Code section 1794(d), to be determined by the Court by way of a noticed motion." (Italics added.) Paragraph six in part stated: "Plaintiffs may recover for fees and costs reasonably and actually incurred in bringing such a fee/cost motion." Again, Mercedes-Benz's 998 offer generally tracks the language of Civil Code section 1794, subdivision (d), which provides that a prevailing buyer may "recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been *reasonably incurred* by the buyer in connection with the commencement and prosecution of such action." (Italics added.) If plaintiff did not like the term, it could, and did, reject the offer.

Where the fee is being earned on contingency, " 'a prevailing buyer . . . is entitled to an award of reasonable attorney fees for time reasonably expended by his or her attorney.' " (*Robertson v. Fleetwood Travel Trailers of California Inc.* (2006) 144 Cal.App.4th 785, 817 (citation omitted).) The offer specifically stated that "In ruling on the fee motion, and except as otherwise provided in this paragraph, the fee and cost amount shall be calculated as if Plaintiff was found to have prevailed in an action under Civil Code section 1794(d)." Plaintiff's attorney's fees accrued under a contingency contract would have been recoverable under Mercedes-Benz's 998 offer.

Plaintiff lastly asserts Mercedes-Benz's 998 offer improperly limited the attorney's fees to before the date of the 998 offer. Plaintiff complains that he would not recover fees for

reviewing and responding to the offer or for "the required work going forward."

On the contrary, the 998 offer stated: "In ruling on the fee motion, and except as otherwise provided in this paragraph, the fee and cost amount shall be calculated as if Plaintiff was found to have prevailed in an action under Civil Code section 1794(d) as of the date of this Statutory Offer, except that . . . plaintiffs may recover for fees and costs reasonably and actually incurred in bringing such a fee/cost motion." The bulk of the work going forward, i.e. a fee and cost motion, is covered by this offer. Given that the date of the 998 offer cuts off Mercedes-Benz's liability if plaintiff rejects the offer and is less successful at trial, this term in paragraph six did not invalidate the offer. (See Civ. Code, § 998, subd. (c)(1).) We conclude the 998 offer was certain and valid.

4. The Trial Court Properly Awarded Prejudgment Interest

With these preliminaries behind us, we turn to the crux of this appeal – was plaintiff entitled to prejudgment interest. The answer to this question drives the answer to who was the prevailing party and whether attorney's fees and costs were properly awarded to plaintiff.

Mercedes-Benz argues that (1) plaintiff did not qualify for prejudgment interest because his damages were uncertain, (2) plaintiff did not provide a proper basis for the prejudgment interest, and (3) the award of interest should have been limited to 7 percent (10 percent was awarded). We address each argument in turn.

a. The Damages Were Certain

The trial court awarded prejudgment interest under Civil Code section 3287(a). "A person who is entitled to recover damages certain, or capable of being made certain by calculation,

and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day. . . ." (Civ. Code, § 3287(a).) The "test for recovery of prejudgment interest under Civil Code section [3287(a)] is whether *defendant* actually knows the amount owed or from reasonably available information could have computed that amount." (*Duale, supra,* 148 Cal.App.4th at pp. 728–729 [italics in original; citations, quotation marks, and brackets omitted].) "Thus, *where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate*." (*Ibid.* [italics in original; quotation marks omitted].)

Nothing in Song Beverly changes the general rule on the award of prejudgment interest under section 3287(a). (*Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 43; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 1004, 1006 (*Doppes*).) If the statutory conditions are satisfied, the court must award prejudgment interest. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958.) "The purpose of prejudgment interest is to compensate the prevailing party for the loss of money during the period before the judgment is entered." (*Tenzera, Inc. v. Osterman* (2012) 205 Cal.App.4th 16, 21.)

We agree with the trial court that plaintiff's recovery was sufficiently certain to entitle it to prejudgment interest. Ironically, Mercedes-Benz's argument that its 998 offer was reasonably certain – an argument we have accepted – also supports *plaintiff's* argument that the damages were sufficiently certain to authorize prejudgment interest. Plaintiff's car payments, and other items referred to in the 998 offer were capable of being calculated and were known by both parties. By the time of trial, Mercedes-Benz had admitted liability in its amended answer. The actual amount of damages awarded was a

result of additur, which Mercedes-Benz accepted. This amount was calculated primarily on plaintiff's payments and remaining loan balance on the vehicle—amounts known to both parties.[6]

In its reply brief, Mercedes-Benz stresses that plaintiff received the same recovery following trial as he would have by taking the offer, implicitly confirming that plaintiff's damages were certain: "MBUSA offered a repurchase and that was what [plaintiff] eventually got. The only reason the dollar amount of a repurchase was more in 2017, than it would have been in 2014 or 2015, was because [plaintiff] extended the lease and then purchased the vehicle."[7]

b. Interest Was Appropriately Set at 10 Percent

The trial court ruled that plaintiff was entitled to 10 percent prejudgment interest under section 3287(b), which provides: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its

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[6] The only item that might have been considered less than certain was the award of $186 in incidental and consequential damages. We treat this amount as de minimus. The 998 offer included incidental costs.

[7] In its opposition to plaintiff's motion to tax costs, Mercedes-Benz argued: "Here plaintiff did not accept MBUSA's March 27, 2015, Section 998 Offer. He did not beat it either. The March 27, 2015 offer provided for all of the same costs the jury found MBUSA offered in its November 14, 2014 letter. Plaintiff did not recover anything more than what was offered on March 27, 2015, even after additur. He is out of pocket zero dollars for his vehicle. He would have been out of pocket zero dollars for his vehicle had he accepted the Section 998 Offer."

discretion, fix, but in no event earlier than the date the action was filed." The trial court also set the interest rate at 10 percent under section 3289(b).[8]

Citing the California Constitution, article XV, section 1, Mercedes-Benz argues that plaintiff brought a statutory claim and as such, is only entitled to a seven percent interest rate per annum.[9] Mercedes-Benz seeks support for this proposition in two cases: *Doppes, supra,* 174 Cal.App.4th at pp. 986-987, and *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 775 (*Children's Hospital.*). Neither case is helpful. The trial court in *Doppes* set the prejudgment interest award at 7 percent, but the Court of Appeal opinion contains no discussion how the trial court arrived at that rate or even if plaintiff argued for 10 percent. The case makes no mention of California Constitution, article XV, section 1. (*Doppes,* at p. 987.)

Children's Hospital is even more attenuated. It had nothing to do with Song-Beverly. There, several hospitals sued the state Department of Health, claiming that "the difference between the reimbursement of in-state and out-of-state hospitals for costs incurred in the treatment and care of Medi-Cal beneficiaries violated not just state and federal laws but the commerce clause (U.S. Const., art. I, § 8, cl. 3) and equal

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[8] Section 3289(b) provides: "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."

[9] Article XV, section 1 actually provides two interest rates, one at seven percent and another at 10 percent "if the money, goods, or things in action are for use primarily for personal, family, or household purposes . . . ."

protection provisions of the federal and state Constitutions." (*Children's Hospital*, *supra,* 97 Cal.App.4th at p. 747.) The hospitals prevailed and were awarded prejudgment interest at the rate of 10 percent under section 3289. The Court of Appeal reduced the interest rate to seven percent after the hospitals had conceded that its action was based on statute not contract. (*Id*. at p. 775.)

We agree with *Doppes* that a lawsuit brought under the Song-Beverly Act is founded on breach of contract. Plaintiff succeeded in proving breach of both implied and express contract warranties. As such, plaintiff was entitled to prejudgment interest at the rate of 10 percent rate. (Civ. Code, §§ 3287(b), 3289, subd. (b).)

c. Mercedes-Benz Invited Any Error in Plaintiff's Entitlement to Prejudgment Interest

Mercedes-Benz asserts on appeal that the prejudgment interest award was "completely arbitrary" and plaintiff "was not entitled to any prejudgment interest because he never presented any evidence in support of his [m]otion to show the dates and amounts of the payments he made under the lease and purchase agreement so as to give the Court a proper basis for calculating prejudgment interest."

Plaintiff's counsel submitted his request for prejudgment interest based on two different assumptions: $4,745.97, if calculated from the date the complaint was filed, and $6,613.03, if calculated from the date of the lease. At the July 7, 2018 posttrial hearing, defense counsel asserted that plaintiff's numbers were excessive and that the interest calculations should have been tied to the date of each lease payment. Defense counsel told the court. "It's going to be about $2,600. I would propose $2,600." Plaintiff's counsel at first refused this amount, but defense counsel insisted: "I think he was out-of-pocket $2,600

as of the date of the 998." After more back and forth, plaintiff's counsel said, "I'll take the 2600 bucks so they can't now make that yet another appellate issue." The court accepted the parties "bargain," and the amended judgment included an award of $2,600 in prejudgment interest.

We have already concluded that prejudgment interest in some amount was required under section 3287(a). In the alternative, we hold that at the July 17, 2018, hearing, Mercedes-Benz invited any error in the trial court's ruling that plaintiff was entitled to prejudgment interest. The invitation came about when Mercedes-Benz proposed and insisted on $2,600, which plaintiff eventually accepted and the court adopted. "The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citation.] . . . At bottom, the doctrine rests on the purpose of the principle, which prevents a party from misleading the trial court and then profiting therefrom in the appellate court." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) "Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.)

d. The Court Did Not Err in Awarding $2600 in Preoffer, Prejudgment, Interest

At the end of the July 17, 2018 hearing, it appeared that the parties had agreed on prejudgment interest of $2600, and that is what the trial court included in the amended judgment. Our review of the colloquy among court and counsel reveals there may have been confusion about the dollar amounts discussed by the parties and the court. Plaintiff's counsel may have been

talking about $2,600 as the amount of interest and Mercedes-Benz's counsel may have been talking about $2,600 as plaintiff's preoffer out-of-pocket loss on which interest should be calculated.

The question of the amount of pre offer, prejudgment interest was eventually placed formally before the court. On July 25, 2018, plaintiff submitted both a proposed order and a proposed amended judgment. Each included prejudgment interest award of $2,600. On August 7, 2018, Mercedes-Benz filed its objections to the proposed judgment. Mercedes-Benz's stated: "Defendant respectfully requests that the Court strike the foregoing [the award of $2600 in prejudgment interest] from the proposed judgment and instead insert the following: [¶] 4. Prejudgment Interest to be calculated based on the amount of interest accrued on $2,600 from the date of Plaintiff's Complaint (November 5, 2014) to the date of Defendant's C.C.P. § 998 Offer to Compromise (March 27, 2015)." Squarely before the court was the question of whether prejudgment interest was properly awarded in the amount $2600 or was to have been calculated on $2600 in out of pocket losses. The trial court considered Mercedes-Benz's request, denied it, and issued a judgment with prejudgment interest of $2,600.

On appeal, Mercedes-Benz renews its argument about the amount the court found the parties negotiated in open court. This issue was directly framed for the trial court by Mercedes-Benz's written objections. In overruling Mercedes-Benz's objections the trial court at least implicitly reviewed what had transpired among court and counsel at the July 17, 2018 hearing and concluded that the parties had agreed on $2,600 in prejudgment interest. The trial court was present at the hearing and participated fully in the discussion about interest. This court was not and did not. We do not second guess the trial court's understanding of what took place at a hearing over which it

presided or the exercise of its judgment in overruling Mercedes-Benz's objection to the judgment.

5. The Trial Court Properly Awarded Costs and Attorney's Fees to Plaintiff as the Prevailing Party

The trial court determined plaintiff was entitled to costs and attorney's fees because the award of preoffer, prejudgment interest meant that plaintiff received a more favorable monetary recovery than what was contained in Mercedes-Benz's 998 offer. The 998 offer had not included prejudgment interest. The court found plaintiff to be the prevailing party under Song-Beverly: "If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (Civ. Code, § 1794, subd. (d).)

We review the prevailing party determination for abuse of direction. (*MacQuiddy, supra,* 233 Cal.App.4th at p. 1047.) Where a statute awards a prevailing party attorney's fees but does not define "prevail," the trial court is tasked with taking "a pragmatic approach to determine which party has prevailed. That is, the trial court would determine which party succeeded on a practical level, by considering the extent to which each party realized its litigation objectives." (*MacQuiddy, supra,* 233 Cal.App.4th at p. 1047.)

Relying on *MacQuiddy,* Mercedes-Benz asserts that plaintiff's sole litigation objective was to obtain a civil penalty, plaintiff did not obtain a civil penalty, and, therefore, he was not the prevailing party. The *MacQuiddy* court first found the 998 offer was ambiguous. (*MacQuiddy, supra,* 233 Cal.App.4th at p. 1050.) It separately addressed the question whether under

section 1794, subdivision (d) of Song-Beverly, the plaintiff was entitled to attorney's fees as the prevailing party. (*Id.* at p. 1045.)

The Court of Appeal affirmed the trial court's finding that the plaintiff was not the prevailing party for the purposes of attorney's fees under Song-Beverly. It reasoned that, before trial, the manufacturer had admitted liability, stipulated to a restitution amount, and the only issue "presented to the jury was whether to impose a civil penalty against Mercedes-Benz for willfully failing to repurchase or replace . . . the car." (*MacQuiddy, supra,* 233 Cal.App.4th at p. 1043.) The jury found against the plaintiff on that issue, and the Court of Appeal concluded it was within the trial court's discretion to find the plaintiff had not prevailed in his litigation objectives. (*Id.* at p. 1049.) These facts are in sharp contrast to the present appeal. The parties here litigated not only the civil penalty but, significantly the amount of restitution owed to plaintiff. Unlike *MacQuiddy*, Mercedes-Benz had not stipulated to an amount. Although we have concluded the amount of damages was sufficiently certain before trial, Mercedes-Benz chose not to stipulate to the amount of damages and instead deferred that determination to the jury.

The role prejudgment interest plays in determining a prevailing party was not before the court in *MacQuiddy* but it was in *Bodell Constr. Co. v. Trs. of Cal. State Univ.* (1998) 62 Cal.App.4th 1508 (*Bodell*). There, the defendant made a valid pretrial 998 offer in the amount of $525,000, plus costs, to settle the plaintiff's breach of construction contract claim. The plaintiff did not accept the offer, and went on to obtain a jury award of $396,624, or $128,376 less than the offer. In a posttrial ruling, the trial court awarded the plaintiff $147,000 in prejudgment interest under section 3287(a). (*Id.* at p. 1512.) When the

prejudgment interest was added to the compensatory damage award, the total amount of recovery was approximately $544,000, giving the plaintiff a recovery more favorable than the 998 offer. (*Id.* at p. 1527.) The defendant appealed, contending all prejudgment interest – both before and after the 998 offer – should be excluded in determining whether the plaintiff had received a more favorable judgment. (*Id.* at p. 1512.)

The Court of Appeal first concluded that prejudgment interest under section 3287(a) was a form of compensatory damages, not an item of costs. The court found "an award of prejudgment interest under Civil Code section 3287 'is intended to make the plaintiff whole "for the accrual of wealth which could have been produced during the period of loss." ' " (*Bodell, supra,* 62 Cal.App.4th at p. 1525 (citations omitted); see also *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 830 ["prejudgment interest is not a cost, but an element of damages"].)

The court then addressed whether all of the prejudgment interest was to be awarded or, in light of the 998 offer, only the preoffer prejudgment interest. The court expressed concern that including all prejudgment interest as an element of damages might undercut the legislative purpose of section 998 to encourage settlements. "Because prejudgment interest that is recoverable under Civil Code section 3287, like attorney fees and ordinary court costs, continues to accrue until entry of judgment, plaintiffs and their counsel may be tempted to reject a defendant's reasonable offer to compromise, hoping that the additional amount of prejudgment interest that will accrue before the case can be tried, when added to the jury's award, will result in a judgment that is 'more favorable' than the rejected statutory offer." (*Bodell, supra,* 62 Cal.App.4th at p. 1526.)

The appellate court effected a bifurcation of prejudgment interest into one part preoffer and one part postoffer to in the prevailing party determination. "We hold that in order to promote its legislative purpose of encouraging settlement of civil litigation prior to trial, subdivision (c) of section 998 as amended in 1994 must be construed to require that in a nontort action in which the plaintiff has not accepted a defendant's section 998 offer to compromise, *post*offer prejudgment interest awarded to the plaintiff under Civil Code section 3287 be excluded in determining whether the plaintiff has obtained a judgment 'more favorable' than the defendant's offer. We further hold that any *pre*offer prejudgment interest the plaintiff is entitled to recover under Civil Code section 3287 in a nontort action is to be included in determining whether the plaintiff has obtained a 'more favorable judgment' within the meaning of subdivision (c) of section 998." (*Ibid.*; s*ee also Mesa Forest Prods. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 332, fn. 6.) The Court of Appeal awarded plaintiff only its preoffer costs; it awarded the defendant its postoffer costs. Because the *Bodell* plaintiff had acknowledged that if the court considered only preoffer, prejudgment interest, the recovery was less than the 998 offer, the Court of Appeal found that the plaintiff was not the prevailing party. (*Bodell, supra,* 62 Cal.App.4th at pp. 1527–1528.)

We need not undertake a *Bodell* bifurcation of pre-998 offer and post-998 offer interest here. At the July 17, 2018, hearing the parties did not address an award of post-offer interest. Rather, the court was emphatic that *Bodell* prohibited an award

of post-offer interest and directed the argument solely to preoffer interest.[10]

We agree with the *Bodell* court's analysis and apply it here. The trial court properly awarded preoffer interest to plaintiff, which made the judgment greater than the 998 offer. Plaintiff was thus the prevailing party.

DISPOSITION

The judgment is affirmed. Plaintiff and respondent Bahram Kadkhoda to recover costs on appeal.

RUBIN, P.J.

WE CONCUR:

MOOR, J.

KIM, J.

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[10] At the hearing, the court stated, "So if it's really just a -- I hate to use the word arbitrary line in the sand that I'm drawing, but I think the policies in *Bodell Construction* are valid. He filed a 998 and what we'll say, prejudgment interest for that date, but not after that date." Whether any post offer prejudgment interest should have been awarded once the court determined that plaintiff was the prevailing party because of the award of preoffer interest is not before us.